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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on May 3, 1955.

OPINIONS BELOW

The opinion of the Court of Claims (R. 19; Appendix, *infra,* pp. 12-28) is reported at 130 F. Supp. 593.

JURISDICTION

The judgment of the Court of Claims was entered on May 3, 1955 (R. 19, 30). On July 29, 1955, by order of Mr. Justice Frankfurter, the

time for filing a petition for a writ of certiorari was extended to and including August 31, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether military shipments of Government-owned food, clothing, and medical and sanitary supplies, destined for use to prevent hunger, disease, and resulting unrest among civilians in areas occupied by American military forces during and in the aftermath of World War II, constituted "military or naval property of the United States moving for military or naval and not for civil use" under Section 321(a) of the Transportation Act of 1940, and were therefore entitled to move at land-grant rates.

STATUTE INVOLVED

Section 321(a), Title III, Part II of the Transportation Act of 1940 (54 Stat. 898, 954) provides in material part as follows:

> Notwithstanding any other provision of law, but subject to the provisions of sections 1(7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the

United States moving for military or naval and not for civil use * * *.[1]

STATEMENT

Shortly after the United States entered World War II, the Army, responding to the problem of setting up and maintaining secure and effective occupation of war areas both during and after hostilities, established a program to care for the basic needs of civilian populations in areas to be occupied or liberated. The end purpose of the program was to keep down civil unrest and disorder, forestall sabotage and stealing, protect lines of communication, and prevent disease, thereby obtaining maximum security for occupation forces and reducing the number of troops required for occupation duty. For this purpose, the Army undertook to supply civilian populations with the food, clothing, medical, sanitary and other supplies which would and did prevent disorder and disease. (R. 28, Tr. 50.)

The program was carried out with funds from military appropriations provided by Congress (R. 14, 29), and in accordance with Army Service Forces Circular 363.[2] Through its Civil Affairs

[1] The "except" clause of Section 321(a) was repealed, effective October 1, 1946, by the Act of December 12, 1945, 59 Stat. 606, which provided "That any travel or transportation specifically contracted for prior to such effective date shall be paid for at the rate, fare, or charge in effect at the time of entering into such contract of carriage or shipment." See *United States* v. *Powell*, 330 U.S. 238, 241, fn. 4.

[2] Part III, Section VI of Circular 363 provided in part as follows (emphasis added):

VI—Civilian Supplies.—1. *General.*—a. This circular establishes the procedure for the shipment of civilian

Division, upon requisitions and orders by theater commanders, the Army shipped supplies it had procured for this purpose on Army "TOG"[3] bills of lading (R. 28-29). The program had world-wide application wherever the armies of the United States were engaged, including Germany, Japan, Korea and the Philippines (R. 27).

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supplies to the commanding general of a U. S. Army force in an oversea theater. Civilian supplies within the scope of this circular are those goods and commodities, excluding butter and lend-lease items, made available *in conformity with military necessity to the civilian populations in areas liberated or occupied by U.S. or Allied military forces.* Such supplies are requisitioned by U. S. Army commanders through normal Army supply channels on the basis of established programs formulated between theaters of operations and the combined civil affairs committee, or, in the case of operations which are not of a combined nature, on the basis of programs formulated between U.S. Army commanders and the War Department.

* * * * *

3. *Requisitions.*—a. Requisitions will be submitted by U.S. Army forces overseas through U.S. Army supply channels to the primary port of embarkation having supply responsibility for the theater concerned. * * *

* * * * *

5. *Shipping Marks.*—Shipments of civilian supplies will be marked in accordance with the following:

* * * * *

d. The oversea address will include the consignee combination "TOG" which will precede the oversea requisition number. For example: BOBO-A-QMI-TOG-A45. This combination "TOG" will be shown on all extract requisitions or shipping orders pertaining to civilian supplies to be shipped in accordance with this circular.

[3] All supplies shipped under Circular 363, fn. 2, *supra*, bore the identifying symbol "TOG". There is no definite testimony in the record indicating the meaning of the symbol "TOG". The importance of the symbol is that it identifies a shipment as one made under Circular 363.

Between January 30, 1946, and September 30, 1946, the respondent, a common carrier by railroad, performed transportation services for the United States by carrying shipments on TOG bills of lading under Circular 363, at the request of the War Department, from various points in the United States to Oakland, California, for reshipment abroad (R. 27). Respondent was the final and delivering rail carrier of the shipments (R. 27). All of the bills of lading on which the shipments were made were stamped with a statement that the articles shipped were military property for military use, and plaintiff's bills for transportation services were accordingly stated at net land-grant rates, computed by making deductions for land grants from the applicable published rates (R. 27). The bills were paid on that basis by the Government's disbursing officers (R. 27).

On January 28, 1952, respondent brought this suit to recover the difference between the land-grant rate it had been paid and the full commercial rate which it claimed was applicable to the shipments in question (R. 1). The court below awarded judgment in the amount of $24,171.55, as the difference between land-grant rates paid and full commercial rates, holding that the shipments in question were made by the War Department for political and humanitarian purposes and not as a matter of military necessity (R. 19, 30).

REASONS FOR GRANTING THE WRIT

Dividing three to two, the Court of Claims has held in this case that Army property, shipped by the Army as part of its effort to insure safe and effective performance of its military occupation duties, is outside the provision in Section 321(a) of the Transportation Act of 1940, *supra*, pp. 2, 3, which retained for the Government the benefit of land-grant rates on "military or naval property of the United States moving for military or naval and not for civil use * * *." The holding rests upon the majority's judgment (R. 20) that when the Secretary of War, acting under the directions of the President, established a program to effectuate rapid and efficient occupation and liberation of war areas, to shorten necessary occupation time, and to make possible occupation by smaller numbers of troops, he was directing his efforts toward "humanitarian and/or political rather than military necessity, even though there were some incidental benefits to the military." The result, affecting a large number of similar claims involving substantial amounts of money, is flatly contrary to this Court's ruling in *Northern Pacific R. Co.* v. *United States,* 330 U. S. 248, as well as the lower court's own holding in *Southern Pacific Co.* v. *United States,* 107 C. Cls. 525.

1. While it has not been possible to secure a complete estimate of the number of cases which may be affected by this decision, partial estimates indicate that there are approximately 4,000 similar claims pending before the General Accounting Office,

representing a potential liability on the part of the United States conservatively estimated [4] at $5,000,000. In addition, there have already been filed in the Court of Claims and district courts suits for amounts totalling $250,000. This Court granted certiorari in *United States* v. *Powell*, 330 U. S. 238, and *Northern Pacific R. Co.* v. *United States*, *supra*, "because of the importance of determining the controlling principle for settlement of the many claims of this character against the Government." 330 U. S. at 240. Much of the task of settlement remains. And the closely divided court below appears to have misconceived the "controlling principle" this Court announced for the purpose. See Point 2, *infra*. These circumstances seem to us to justify certiorari even though the land-grant statute is no longer in effect. *Cf. Shaughnessy* v. *Accardi*, 349 U. S. 280, 281.

2. In Section 321(a), preserving for the Government "an economic privilege of great value" (*Northern Pacific*, *supra*, at 257), Congress provided for transportation at land-grant rates of "military or naval property of the United States moving for military or naval and not for civil use * * *." There is no question that the shipments in this case were "military * * * property"; and we think it equally clear, under the criteria this Court has announced, that the shipments moved

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[4] The ten-year statute of limitations applicable to claims before the General Accounting Office (31 U.S.C. 71a) was taken into account in reducing a total potential liability of $15,000,000 by two-thirds.

"for military or naval and not for civil use * * *." For the property in question is described explicitly in the language of the *Northern Pacific* decision defining the meaning of the latter phrase, which is critical here. The Court said (330 U. S. at 254-255):

> Military or naval use includes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under § 321(a).

The use of the shipments in this case fell squarely within this language and within the familiar understanding of modern military operations the language reflects. Here, undeniably, was a use of property by the military to further one of their appropriate "projects," commanded by the highest authority, directly related to one of "their many needs," for liberated territory while the fighting continued and "in their occupation after victory [was] won." To handle effectively the military task of military occupation—to minimize resistance and unrest, to lessen the number of occupation troops required, to promote the security and health of these troops, and to shorten the task—the Army shipped food, clothing, and medical and sanitary

supplies to be distributed to the civilian populations of, principally, Germany and Japan. The direct and immediate relation of this program to the military occupation effort—the "controlling" test under Section 321—was clear. Civilians in occupied areas who have been provided with the basic necessities will be and, as a matter of fact, were less likely to steal or sabotage, engage in disorders, and become diseased. A settled and orderly civilian population means a peaceful occupation requiring fewer troops. A civilian population protected against disease means an occupation army relatively free from the dangers of epidemics and contagion. Provision for basic civilian needs in occupied areas was, in short, a military necessity—an answer to one perplexing military problem of efficient occupation.

This conclusion seems obvious to us, as it did to Judge Madden, who dissented below, and to Chief Judge Jones, who joined him. It seemed obvious to the high military authorities who conducted the program as part of their occupation duties. If their judgment and the evidence of history could be debated, this would appear, nevertheless, to be an appropriate case for holding that the fact of procurement and use by the military should "carry special weight or be decisive * * *." *Northern Pacific, supra,* at 253. Here, the military authorities deliberately chose to use their appropriations for the shipments involved, judging that such actions would aid in the performance of their military responsibilities, and no sufficient reason has

been presented for dismissing their determination. Compare the lower court's own earlier view, when it noted "what the military authorities considered a military necessity" and acknowledged the demands of "civilized warfare" in holding the land grant benefit of Section 321(a) applicable to shipments for use by civilians removed to War Relocation Centers. *Southern Pacific Co.* v. *United States,* 107 C. Cls. 525, 537, 540.

If the "humanitarian and/or political" considerations affecting the character of the military occupation could cast doubt upon the "military" nature of the use involved here, comparable arguments as to what is properly martial could unquestionably be raised respecting shipments of material for bowling alleys to be used by civilian workers and troops overseas. Yet this Court perceived no difficulty in holding the benefit of land-grant rates under Section 321 applicable to the latter shipments. *Northern Pacific, supra,* at 252, 255. The plain terms and the rationale of that decision leave no ground, we believe, for the position of the Court of Claims in this case.

3. We had supposed that the principles of *Powell* and *Northern Pacific* were clear beyond question. Accordingly, in *Union Pacific R. R. Co.* v. *United States,* 124 C. Cls. 254, the first such case to arise after those decisions, the Government made only a scant paper record on which to present the problem of military shipments of goods for civilian needs in occupied territory. Though the decision in that case was, in our view, directly contrary to

Northern Pacific, it seemed appropriate to forego petitioning for certiorari and, instead, to seek adherence to this Court's construction in a case where a complete, testimonial trial record would portray the facts fully. Confronted with such a record, three of the five judges of the Court of Claims have adhered to their earlier decision. The continuing fiscal importance of this matter (*supra,* pp. 6, 7), despite the repeal of Section 321(a) (*supra,* p. 3, fn. 1) leads us now to seek enforcement of the rule in *Northern Pacific,* which seems plainly applicable here.

CONCLUSION

Because the departure from this Court's decision seems plain, and because a large number of similar claims is affected, it is respectfully submitted that this is an appropriate case for the granting of certiorari and summary reversal, without further briefs or oral argument, on the authority of *Northern Pacific R. Co.* v. *United States,* 330 U.S. 248.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
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SAMUEL D. SLADE,
SONDRA K. SLADE,
Attorneys.

AUGUST, 1955.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 38-52

(DECIDED May 3, 1955)

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY v. THE UNITED STATES

Mr. Lawrence Cake for plaintiff. *Mr. Raymond A. Negus* was on the brief.

Mr. Francis X. Daly, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for defendant.

OPINION

LARAMORE, *Judge,* delivered the opinion of the court:

The plaintiff, a common carrier by railroad, sues the Government for the difference between the land-grant rate, which it billed and received, and the higher commercial rate to which it claims to be entitled. The shipments in question occurred in 1946 and consisted of dried and canned foodstuffs, drygoods, soap and drugs shipped at the request of the War Department on Army bills of lading from various points in the United States to Oakland, California, for reshipment overseas. Ap-

parently it was not until some time following the shipments and receipt of payment computed at land-grant rates that plaintiff conceived its error in not billing at commercial rates.

The problem involves an interpretation of section 321(a), Title III, Part II, of the Transportation Act of 1940 (54 Stat. 898, 954),[1] which the Court has heretofore considered under almost identical circumstances (*Union Pacific Railroad Company* v. *United States,* 124 C. Cls. 254).

The parties have stipulated that, if plaintiff's interpretation of the Transportation Act is correct, it is entitled to an additional $24,171.55, whereas should defendant prevail, plaintiff must refund $2,362.63 for certain overpayments attributable to causes not pertinent to the immediate issues.

The letter quoted in finding 4.a. clearly indicates that the Army was to assume the initial burden of shipping and distributing the relief supplies to liberated areas under the rehabilitation program of the United States until such time as civilian agencies could take over this function.

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[1] SEC. 321. (a) Notwithstanding any other provision of law, but subject to the provisions of sections 1 (7) and 22 of the Interstate Commerce Act, as amended, the full applicable commercial rates, fares, or charges shall be paid for transportation by any common carrier subject to such Act of any persons or property for the United States, or on its behalf, except that the foregoing provision shall not apply to the transportation of military or naval property of the United States moving for military or naval and not for civil use * * *.

The articles in question were procured, shipped, and distributed by the Army to the civilian populations of liberated and occupied areas in Europe and Asia, and were consumed and used by such populations. This was all accomplished pursuant to this program, paid for out of funds appropriated for that purpose by Congress, and executed by the Army under the supervision of its Civil Affairs Division. The military officials represented to Congress that the program was designed in response to military necessity. It is admitted that the supplies involved in this case were shipped solely for civilian consumption and use. The Government contends that even though the supplies were for civilian use they were shipped for military use because they were a military necessity in order to allay civilian unrest and disease, to curtail sabotage and stealing, to protect lines of communication, and assure the security of our occupying forces. We are of the opinion that the obvious primary purpose of shipping these supplies was humanitarian and/or political rather than military necessity, even though there were some incidental benefits to the military. The primary beneficiaries were alien civilians caught in the wake of the war.

The original enactment of section 321(a) of the Transportation Act of 1940 excepted from application of full commercial rates the "transportation of military or naval property of the United States moving for military or naval and not for

civil use."[2] Accordingly, in order for land-grant rates to apply two requirements must be met, the property must be military or naval and it must be moving for a military or naval, and not a civil use. From the pattern of decided cases, in all but a few instances ascertainment of the intended use normally will determine the nature of the property.

Aside from minor variations in facts, the instant case is indistinguishable in principle from *United States* v. *Powell,* 330 U. S. 238, and the *Union Pacific* case, *supra.* The factual distinctions between this and *Union Pacific* relied upon by defendant to dictate an opposite legal conclusion are evidence here (1) that the Army supervised the supplies from their procurement through their distribution for consumption by foreign civilian populations; (2) that the supplies in question were earmarked "TOG" on the shipping documents (as were all supplies shipped pursuant to the Army program in occupied and liberated areas, to distinguish them from all other supplies used by the Army); (3) that the supplies were, when shipped by plaintiff, in a final form ready for their ultimate consumption; and (4) that the movements were from the point of manufacture to the point of embarkation *en route* to an overseas destination.

While the opinion in the *Union Pacific* case does not disclose that the Army attended and supervised

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[2] This provision was eliminated from section 321 (a) by the Act of December 12, 1945, 59 Stat. 606, 49 U.S.C. 65 (a). While the elimination was made effective as of October 1, 1946, rights accrued prior thereto were not affected.

the supplies from their manufacture through their distribution overseas, the record itself indicates that this was so.

There is no question from the record in the *Union Pacific* case but that the commodities were part of the same Army program in aid of liberated and occupied areas as were the articles in the instant case. The presence or lack of a symbolized shipping designation on bills of lading does not control or vary the known facts that in both cases the supplies were actually used by and for civilian populations in the war's aftermath.

It cannot be perceived how either of the remaining distinctions contended by defendant would affect the legal principle. The fact that the articles shipped here were in a finished form ready for use by the final consumer would, it would seem, argue their "civil" use more conclusively than articles such as the fertilizer ingredients in the *Union Pacific* case, which were at critical times a manufacturing step removed from the form in which they left the country. In an analogous situation in *Northern Pacific Railway Company* v. *United States,* 330 U. S. 248, the court discounted the effect of an intermediate manufacturing stage on the principle involved, and stated that the end use of the shipment controls. *United States* v. *Powell, supra.*

In considering the similarities of these facts with those in *Union Pacific,* it should be noted that not only did the shipments in both cases occur in approximately the same post-hostilities period, but

the essential facts emphasized by defendant in the instant case as to the military necessity attending the aid programs were considered and rejected by the court in the *Union Pacific* opinion. Their elaboration in the present record does not alter their significance.

The Supreme Court in the *Powell* case, *supra,* held that a shipment of fertilizer to England under the lend-lease program was not a shipment for military use. The Court stated in that case, at page 242, that "* * * it is not the transportation of 'all' property of the United States that is excepted but only the transportation of 'military or naval' property of the United States." The Court further stated that "* * * the excepted property must be 'moving for military or naval and not for civil use'. Thus the scope of the clause is restricted both by the nature of the property shipped and by the use to which it will be put at the end of the transportation." In that case the peoples of England were our potential allies, and the primary purpose in shipping material was to build up the strength of England in order that she could successfully prosecute the war with Germany. This would seem to be a stronger case in favor of the Government. Yet, in that case, the Court held the shipment was not for military use.

Just as the fertilizer ingredients, in *Union Pacific* and *Powell, supra,* bestowed only an incidental benefit on the military effort, and were primarily for civilian use, so the articles in the instant case fall into the same category.

The lexicological distinction urged by defendant between "civil" and "civilian" use is without merit. This was met in the *Powell* case where both terms were used interchangeably and the court said: "But in common parlance, such activities [*i. e.,* ones comparable to the program in the instant case] are civil, not military."

We are of the opinion that *United States* v. *Powell, supra,* and *Union Pacific Railroad Company* v. *United States, supra,* are controlling in this instance and that the goods shipped were for civil rather than military use.

Therefore, plaintiff is entitled to recover. Judgment will be entered in the amount of $24,171.55.

WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

MADDEN, *Judge,* dissenting:

M. Clemenceau said "War is too important to be left to the generals". The court has, in its decision and opinion, subscribed to that sentiment. The generals had the absurd notion that dried and tinned foodstuffs, cloth, soap and drugs were military necessities, when a victorious American Army occupied an enemy country. The generals persuaded a Congress which, at the time, entertained no humanitarian sentiments toward these enemy countries, to this absurd view, and thereby induced it to appropriate money to buy and transport these things. But the judges know that you just don't fight wars that way. Alexander the Great did not do it; Julius Caesar did not do it; The Ghengis Khan did not do it; Napoleon did not do it. So, whatever the generals may have thought they were

doing, the judges know that they were not carrying on a military occupation. The judges know that they were engaging in social work and politics.

When I weigh the judgment of the judges against the judgment of the generals, I find that the judgment of the generals was better. This was proved by the history of our military occupation of Japan, Korea and Germany. Resistance movements such as those which had bedeviled the Germans and Japanese in the countries occupied by them, and impaired the success of their armies, did not occur. Epidemics among the civilian population which would or might have disabled our troops did not occur. Because there was no resistance or disorder in the population of the occupied countries, it was possible to withdraw the greater part of our troops much more rapidly than would otherwise have been possible.

The goods so distributed were, then, in a sense, substitutes for soldiers and rifles, for the purposes of the Army in successfully occupying the conquered countries until the political authorities could make up their minds what to do with them. The fact that the Army's program showed foresight and imagination beyond what Alexander the Great might have shown, is, of course, to the credit of the Army. And it does not prove that the goods which it used to win military success, were not, though historically unconventional, used for a military purpose.

By the direction of the court, Commissioner Bernhardt not only made findings of the facts, but recommended to the court a conclusion of law. His

recommended conclusion was that the goods in question were moving for civil and not for military use, and that, therefore, land-grant rates were not applicable. He supported his conclusion with a thoughtful and well-written opinion. However, in the commissioner's finding 4 (b) he stated, of the "end purposes" of the Army's program of distribution of goods such as those here in question, "Such purposes were properly a matter of military necessity both during and after hostilities." Yet in his opinion he says "But these military purposes, however intended, were served only incidentally. The primary beneficiaries were alien civilians caught in the wake of war."

The commissioner's opinion was influenced greatly by our recent decision in *Union Pacific Railroad Company* v. *United States,* 124 C. Cls. 254. In that case the goods shipped were raw materials destined to be manufactured into fertilizer at an ordnance plant operated by the Government's Emergency Export Corporation. The shipments were made by the Government, from various points in the United States to the ordnance plant. After the materials had been manufactured into fertilizer, the fertilizer was to be shipped to seaports from whence it was to be transported abroad to be distributed by the Army under the same program which has been described in this opinion. We held that the shipments of the raw materials to the manufacturing plant were not movements "for military use." We relied on *United States* v. *Powell,* 330 U. S. 238, in which the Supreme Court

held that a shipment of fertilizer to England under the lend-lease program was not a shipment for military use.

The commissioner's reliance upon our *Union Pacific* decision would make it necessary for us, if we would hold that the instant shipments were for military use, either to distinguish the *Union Pacific* case or overrule it, or, perhaps, to make use of some of each of those judicial processes. In that case the shipment of the raw materials to the factory in the United States was a step farther away from the actual ultimate use of the fertilizer by the Army than is the shipment in the instant case. The intended ultimate use of the fertilizer after it had been manufactured and carried to the occupied countries was also not so immediately connected with the Army's purposes as was the distribution of the goods, ready for consumption, which occurred in the instant case.

In various legal situations, the applicability of a doctrine depends not so much upon the logic of the relation between two acts as upon the directness or proximity of that relation. Legal cause in the law of negligence; directness of the effect upon interstate commerce of the activity sought to be prohibited or regulated, in constitutional law; remoteness in the law of damages, are examples. We think that the factual differences between the instant case and the *Union Pacific* case are of more than superficial importance.

In the *Union Pacific* case, the only precedent cited by the plaintiff was *United States* v. *Powell,*

supra. In that case, as in *Union Pacific*, the material involved was fertilizer. But the fertilizer was being sent to England as a "lend-lease" item, and was to be used on farms in England to make that country's agricultural production more nearly adequate to the country's needs. The lend-lease program was a defense measure, as were our domestic programs of price control, materials allocations, etc., in this country. But the shipment was not for military use, any more than the furnishing of fertilizer by the Government to American farmers to increase our food supply and thus strengthen our ability to defend the country would be a shipment for military use.

In our opinion in the *Union Pacific* case, we relied entirely upon the Supreme Court's decision and opinion in the *Powell* case. Upon reconsideration, I think that that case is readily distinguishable from cases like the one now before us. In the case of *Northern Pacific Railway Company* v. *United States*, 330 U. S. 248, decided on the same day as the *Powell* case, the Court, in holding that the shipment there involved was for military use, said "It is the relation of the shipment to the military or naval effort that is controlling under Section 321 (a)." In the instant case our commissioner has found, and I would find, as to the purposes of the shipments, "such purposes were properly a matter of military necessity both during and after hostilities." Use by the Army to satisfy a military necessity would seem to be a military use. The Supreme Court in the *Northern Pacific* case,

supra, at page 247, held that the exception stated in Section 321 (a) should be liberally construed in favor of the Government, since the section, other than the exception, was a grant of public property to an individual, or the relinquishment of a public interest.

In the *Union Pacific* case, *supra,* the facts found were based upon a stipulation, without oral testimony. Attached to the stipulation were documents showing the purpose of the program of distribution. In the instant case the Government produced as a witness Major General John H. Hilldring, who was a member of the staff of the Army Chief of Staff, and was in charge of the program of distribution. It also produced Lieutenant General John C. H. Lee who was Commanding General of the Army Services of Supply in Europe, who had supervision over distribution of the kinds of goods here involved. The testimony of these officers was most impressive, as is shown by the finding of our commissioner, who heard their testimony, that the distribution was a matter of military necessity. It may well be that if the Government's position in the *Union Pacific* case had been as well supported, the decision would have been different.

I would dismiss the plaintiff's petition.

JONES, *Chief Judge,* joins in the foregoing dissent.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner C. Murray Bernhardt, and

the briefs and argument of counsel, makes findings of fact as follows:

1. Plaintiff, a corporation organized and existing under the laws of the State of Kansas, is a common carrier by railroad over its own lines and jointly with other common carriers.

2. From January 30, 1946, to September 30, 1946, the plaintiff, over its own lines and jointly with other common carriers, performed transportation services for defendant by carrying shipments of various articles and commodities at the request of the War Department on bills of lading issued by the War Department from various points in the United States to Oakland, California, plaintiff being the final and delivering rail carrier of the shipments. All the bills of lading on which the shipments were made were stamped with a statement that the articles and commodities shipped were military property for military use, and plaintiff's bills for the services of transportation were accordingly stated at net land-grant rates computed by making deductions for land-grant from the applicable published rates, and were paid on that basis by the defendant's disbursing officers.

3. The shipments involved in this case were dried and canned foodstuffs, drygoods, soap and drugs, procured by the War Department for shipment overseas for distribution to and for the use of the civilian populations of countries occupied and/or liberated by United States military forces. Of the 472 shipments, 357, 60 and 52 were for use

in the American occupied areas of Japan, Korea and Germany, respectively, and the remaining 3 shipments were shipped to Manila and to UNRRA for use in areas liberated by our forces.

4. *a.* A letter dated November 10, 1943, from the President to the Secretary of War, stated:

> Although other agencies of the Government are preparing themselves for the work that must be done in connection with the relief and rehabilitation of liberated areas, it is quite apparent if prompt results are to be obtained the Army will have to assume the initial burden of shipping and distributing relief supplies. This will not only be the case in the event that active military operations are under way, but also in the event of a German collapse. I envisage that in the event of a German collapse, the need for the Army to undertake this work will be all the more apparent.
>
> Therefore, I direct that you have the Army undertake the planning necessary to enable it to carry out this task to the end that it shall be prepared to perform this function pending such time as civilian agencies must be prepared to carry out the longer range program of relief.
>
> You may take this letter as my authority to you to call upon all other agencies of the Government for such plans and assistance as you may need. For all matters of policy that have to be determined in connection with this work, you will consult with the State Department for

any political advice; and upon the Treasury for such economic and fiscal direction as you may need.

b. Shortly thereafter the Army established a program to care for the basic, minimum needs and requirements of the civilian populations in areas to be occupied and/or liberated, both during hostilities and after the end of hostilities, in the way of food, drygoods, including clothing, medical supplies, sanitary supplies, and other basic needs. This program continued in operation all during the balance of hostilities and after the cessation thereof, and beyond October 1, 1946. This program was carried out by the Army with funds from military appropriations provided by Congress for that purpose. In seeking such appropriations, responsible military officials represented to Congress that the program was designed in response to military necessity.

c. The purpose of this program of furnishing these supplies for civilian use was obivously primarily humanitarian and/or political and of incidental benefit to the military in that it was to help to keep down civil unrest and disorders, to prevent sabotage and stealing, to protect lines of communication, to assure the security of the occupying forces, to promote friendship with the civilian population, to prevent disease and epidemics, and to prevent malnutrition and its attendant evils among the civilian population.

d. The foregoing program was carried out by the Army under the supervision of its Civil Affairs Division duly created March 1, 1943, through the

medium of Army theater commanders and the Army Service Forces, and implemented by Army Service Forces Circular 363, issued November 3, 1944, prescribing the procedures for shipment and distribution of supplies.

5. *a.* Virtually all supplies shipped by the Army pursuant to the program were identified on accompanying bills of lading by the symbol "TOG" to distinguish them from supplies shipped for other purposes. All such supplies involved in the program were procured, shipped, and distributed by the Army to the civilian populations of areas occupied and/or liberated by the Army, and consumed and used by such civilian populations. Such supplies were entirely under Army control from procurement to final distribution.

b. All of the shipments described in Finding 3 were part of the aforesaid Army program and all but 3 of the bills of lading pertaining to the shipments bore the symbol "TOG". The evidence does not explain the absence of such symbol on the bills of lading pertaining to these 3 shipments, but there is no contention that such shipments were not part of the said supply program.

6. The parties stipulated the issue in this case to be whether plaintiff was entitled to be paid for its transportation services to defendant at land-grant rates, which it received, or at the full commercial rate. Plaintiff sues to recover the balance of the full commercial rate.

7. The transportation charges paid by the defendant to plaintiff were on the basis of the land-grant rates and were for the amounts originally

billed by the plaintiff. Certain overpayments of $2,362.63 were made by the defendant arising from errors originally made in the computation of the rates and charges billed by plaintiff, said errors being unrelated to the issue. Defendant has filed no counterclaim with respect to the overpayment.

8. We find that the shipments in question did not consist of military property moving for military use, and in this posture the defendant concedes that plaintiff is entitled to recover $24,171.55 on the basis of the full commercial rates.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover, and it is therefore adjudged and ordered that it recover of and from the United States the sum of twenty-four thousand one hundred seventy-one dollars and fifty-five cents ($24,171.55).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 31, 1955.

(S.) FELIX FRANKFURTER,
Associate Justice of the Supreme Court of the United States.

Dated this 29th day of July, 1955.

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IN THE

Supreme Court of the United States

October Term 1955

No. 360

UNITED STATES OF AMERICA, *Petitioner,*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent.*

On Petition for Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENT IN OPPOSITION

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Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

The Government's statement of the question presented is misleading in two important respects. First, it describes the shipments in question as "*military shipments*"—a description which answers the question presented as well as states it. Second, it refers to the shipments in question as having been made *during* and in the aftermath of World

War II. In fact, they were made from January 30, 1946, to September 30, 1946.[1]

The question presented,stated objectively in the terms of the findings of fact[2] of the Court of Claims, is:

> Whether shipments—from January 30, 1946, to Stptember 30, 1946—of dried and canned foodstuffs, drygoods, soap and drugs, procured by the War Department for shipment overseas for distribution to and for the use of the civilian populations of countries occupied and/or liberated by United States military forces, constituted "military or naval property of the United States moving for military or naval and not for civil use" under section 321(a) of the Transportation Act of 1940, and were therefore entitled to move at land-grant rates.

STATEMENT

The purpose of the petition for certiorari in this case is to re-open a question—long since settled—as to the interpretation of a statute which has been repealed. The question is the scope of the "except clause" of Section 321(a) of the Transportation Act of 1940 (54 Stat. 898, 954).

In *United States* v. *Powell,* 330 U. S. 238, decided March 3, 1947, this court held that lend-lease shipments of fertilizer to Great Britain were for civil use and not for military use, in the sense of the statute. The following quotations from the opinion of this court are pertinent:

> "Under conditions of modern warfare, foodstuffs lend-leased for civilian consumption, sustained the

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[1] VE-Day was proclaimed on May 8, 1945, VJ-Day on August 16, 1945. Proclamations Nos. 2651 and 2660, 10 F. R. 5169, 10111.

[2] Findings 2 and 3, page 24 of Appendix to Petition for Certiorari. See also Finding 4c, page 26.

war production program and made possible the continued manufacture of munitions, arms, and other war supplies necessary to maintain the armed forces. For like reasons, fertilizers which made possible increased food production served the same end. In that sense all civilian supplies which maintained the health and vigor of citizens at home or abroad served military functions. * * *

"Our difficulty, however, arises when we are asked to transplant those standards into the Transportation Act. * * *

"In the first place, the Transportation Act, which preceded the Lend-Lease Act by only six months, provided its own standards. * * * It used more conventional language—'military or naval' use as contrasted to 'civil' use. * * *.

"In the second place, the language of Section 321 (a) emphasizes a distinction which would be largely obliterated if the requirements of national defense, accentuated by a total war being waged in other parts of the world, were read into it. Section 321 (a) uses 'military or naval' use in contrast to 'civil' use. * * * When the resources of a nation are mobilized for war, most of what it does is for a military end—whether it be rationing, or increased industrial or agricultural production, price control, or the host of other familiar activities. But in common parlance, such activities are civil, not military. It seems to us that Congress marked that distinction when it wrote Section 321 (a). If that is not the distinction, then 'for military or naval and not for civil use' would have to be read 'for military or naval use or for civil use which serves the national defense.' So to construe Section 321 (a) would, it seems to us, largely or substantially wipe out the line which Congress drew and, in time of war, would blend 'civil' and 'military' when Congress undertook to separate them."
330 U.S. pp. 243-246.

In *Northern Pacific R. Co.* v. *United States,* 330 U. S. 248, also decided on March 3, 1947, this court held that "in general the use to which the property is to be put is the

controlling test of its military character" and that the shipments in question in that case were moving for military use in the sense of the statute.

In earlier cases the Court of Claims had decided the same question of the scope of the "except clause" and had held that the shipments in question in those cases were shipments of military property for military use. *Southern Pacific Co.* v. *United States,* 107 C. Cls. 167, 525.

In later cases the Court of Claims followed and applied the decisions of this court in the *Powell* and *Northern Pacific* cases. *Chicago and North Western R. Co.* v. *United States,* 109 C. Cls. 804, and *Union Pacific R. Co.* v. *United States,* 124 C. Cls. 254.

In the last cited case, *Union Pacific R. Co.* v. *United States,* 124 C. Cls. 254, the Court of Claims held that shipments of material for fertilizer for civilian use in occupied countries, under an Army program for relief in occupied countries, were not shipments for military use in the sense of the statute. In the opinion in that case the court said:

> "Defendant contends that the shipments were for the purpose of furnishing fertilizer to occupied areas, that this was a matter of vital military necessity, and, therefore, that they were for military use. It says that the fertilizer program was intended to prevent starvation, disease, and unrest which might result from famine in occupied areas, which might endanger the occupying forces or interfere with military operations. This, defendant says, brings the shipments in question within the spirit and the letter of section 321 (a), although the food to be produced was for use by the civilian population.
>
> "It is true that the increase of the food supply in occupied areas was aimed at preventing starvation, disease, and unrest in such areas, and that benefits to our armed forces undoubtedly resulted from this program. It does not follow, however, that fertilizer shipped to

occupied areas to increase food production for consumption by the civilian population is a shipment of property for military use within the meaning of section 321 (a)."

* * * *

"This seems to us decisive of the question presented in this case. In both cases the fertilizer was for use by civilians for the production of food. In both cases the incidental result aided the military effort, but since they were primarily for civilian and not for military or naval use, they do not come within the except clause of the Transportation Act."[3]

In the instant case the Government again contends that the shipments here in question were shipments of "military * * * property * * * moving for military * * * and not for civil use" in the sense of the statute, because they were part of an Army program for feeding and furnishing essential supplies to the civilian populations of occupied and liberated countries, all of which aided the Army in its task of occupation and was a matter of military necessity.

On that point, made again in the instant case, the Court of Claims said that aside from minor variations in the facts the case was indistinguishable in principle from *United States* v. *Powell*, 330 U. S. 238, and *Union Pacific R. Co.* v. *United States*, 124 C. Cls. 254, that the record in the *Union Pacific* case showed that the commodities were part of the same Army program in aid of liberated and occupied countries as were the articles in the instant case, and that "just as the fertilizer ingredients, in *Union Pacific* and *Powell, supra*, bestowed only an incidental benefit on the military effort, and were primarily for civilian use, so the articles in the instant case fall into the same category." The Court of Claims concluded:

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[3] The Government accepted the decision and did not apply for certiorari.

"We are of the opinion that *United States* v. *Powell, supra,* and *Union Pacific Railroad Company* v. *United States, supra,* are controlling in this instance and that the goods shipped were for civil rather than military use." (pp. 15-18, Appendix to Petition for Certiorari)

REASONS STATED FOR GRANTING THE WRIT

It is said that the question presented is important because of a large potential liability on the part of the United States, that there are suits pending in the Court of Claims and in the district courts for amounts totalling $250,000, and that there are many claims pending before the General Accounting Office. So far as the carriers are concerned, the latest of the shipments in question would be on September 30, 1946, all land-grant rates having been repealed effective October 1, 1946, and any such claims on account of which suits were not filed prior to October 1, 1952, are barred by the six-years statute of limitations, 28 U. S. Code, sec. 2501.

The only other reason stated for granting the writ is that the Court of Claims decided this case wrongly, as well as the preceding case *Union Pacific R. Co.* v. *United States,* 124 C. Cls. 254. The opinion of the Court of Claims speaks for itself. In view of the decisions of this court in *United States* v. *Powell* and *Northern Pacific R. Co.* v. *United States,* 330 U. S. 238, 248, and the subsequent decisions of the Court of Claims in the cases cited above, it can hardly be contended seriously that the law on this subject—the scope of the "except clause" of Section 321(a) of the Transportation Act of 1940—is unsettled or calls for further consideration by this court.

In short, the sole reason for seeking the writ is that in the Government's view the Court of Claims decided this

case wrongly. On the contrary, the respondent submits that the case was rightly decided.

Respectfully submitted,

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September 1955.